Supreme Court, U.S.
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In The Supreme Court of the United States

October Term, 1996

ALLIANCE AGAINST IFQS; LADY BLACKIE, INC.; MAKO HAGGERTY; MATHEW DONOHOE; NANCY L. LANDE; ADRIAN LECORNU; HOWARD CARLOUGH; JERE MURRAY; PAUL K. SEATON; WILLIAM SULLIVAN; DON HALL;

Petitioner,

vs.

RONALD H. BROWN, Secretary of Commerce; CLARENCE B. PAUTZKE, Executive Director North Pacific Fisheries Management Council; WESTERN ALASKA FISHERIES DEVELOPMENT ASSOCIATION;

Respondents.

and

PETER M. KNUTSEN; EDWIN FUGLVOG; ROBERT J. WURM; ANDREW SCALZI; NANCY PHILLIPS, et. al.;

Intervenors - Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Whether, By the Court's Giving So Much Deference to the Secretary's Promulgation of a Regulation that the Regulation Violated a Statutory Directive, Petitioners were Denied Procedural Due Process.

B. Whether Petitioners Were Also Denied Procedural Due Process Because The Level of Deference Shown to the Secretary's Action Shielded from Judicial Review Serious Conflicts of Interest on the Fisheries Council which Proposed the Regulation.

C. Whether the Regulation is also Rendered Invalid Because Several Statutory Directives were Violated.

LIST OF ALL PARTIES TO THE PROCEEDING, PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

The caption of the case contains the names of all the parties.

The only Plaintiffs-Petitioners which are not individuals, Alliance Against IFQs and Lady Blackie, Inc., have no parent companies and no nonwholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Alliance Against IFQs, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 84 F.3d 343 and is reproduced in the Appendix filed herewith ("App.") at 1a. The unreported opinions of the district court in this case are reproduced at Appendices B, C, and D. The transcript of oral argument before the District Court on December 19, 1994 is included as Appendix N.

STATEMENT OF JURISDICTION

On May 22, 1996, a panel of the United States Court of Appeals for the Ninth Circuit issued an opinion and order affirming the judgment of the United States District Court for the District of Alaska which granted summary judgment to Defendants and dismissed Petitioners' complaint. Petitioners timely filed a Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc. On August 15, 1996, the Ninth Circuit denied Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE

United States Constitution, Amendment V

United States Constitution, Amendment XIV, § 1

16 U.S.C. § 773c(c)
16 U.S.C. § 1851(a)(4)(A)
16 U.S.C. § 1853(d)(1)(A)(f)(2)
16 U.S.C. § 1855(b)(1)
28 U.S.C. § 1254
29 U.S.C. § 1291

58 Federal Register 59,375 (50 C.F.R. § 676)

The full text of these provisions are set out in the Appendix.

STATEMENT OF THE CASE

"This is a troubling case[,]" as the Ninth Circuit candidly acknowledged. Alliance Against IFQs v. Brown, 84 F.3d 343, 352 (9th Cir. 1996). The Individual Fishing Quota (IFQ) program for Pacific halibut and sablefish gave fishing privileges worth more than $100 million to 88 individuals and corporations -- vessel owners and lessees, all -- and none at all to those who fish for their

livelihood -- the fishermen themselves. As the Ninth Circuit noted, "[p]erfectly innocent people going about their legitimate business in a productive industry have suffered great economic harm because the federal regulatory scheme changed." Id., 84 F.3d at 352.

Because the IFQ program allocates fishing privileges only to owners and lessees, and not to crew and others who actually fish, the Ninth Circuit also concluded that the program "violates the statutory command of fairness and equity to 'all' the fishermen." Id. at 348; see 16 U.S.C. § 1851(a)(4)(A) and 16 U.S.C. § 773c(c). In spite of the plan's violating both the spirit and the express language of this "statutory command," the Ninth Circuit nevertheless concluded that the Secretary did not abuse his discretion in approving the program.[1/] Id. at 352.

In reaching this conclusion, the Ninth Circuit, like the District Court before it, gave such enormous deference to the Secretary's regulation that it

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[1/] The Secretary of Commerce has no authority either to develop a limited access plan or to modify one submitted for review. See discussion infra p. 12, text accompanying n.3 and n.3.

effectively nullified Petitioners' right to seek judicial review of the regulation under 16 U.S.C. § 1855(b)(1). In other words, owing to this excessively deferential standard of review, Petitioners were denied their right to judicial review of the regulation in question. Petitioners therefore were not afforded due process of law in accordance with constitutional guarantees. See U.S. Const. amend V and amend XIV, § 1.

The Alliance Against IFQs and other Petitioners (the "Alliance") therefore respectfully request that the Supreme Court of the United States grant the instant Petition for Certiorari to review and reverse the decision of the Ninth Circuit.

A. Statement of Facts

The Individual Fishing Quota (IFQ) program for Pacific halibut and sablefish gave away to a few individuals and corporations who owned or leased vessels fishing privileges worth more than $800 million. At the same time, the program barred from these same fisheries thousands of others, mostly fishermen without an ownership interest in a vessel, who had depended on them for their livelihood. 58 Fed. Reg. 59,405 (50 C.F.R. § 676.16(c)). The Alliance, a group of fishermen from Alaska and Washington, opposed the IFQ program and

its implementation, because the program privatizes a public resource and does so unfairly, and because it drastically changes historic fishing practices, destroying fishermen's lives and their communities.[2/]

1. The IFQ Program

On November 9, 1993, the Secretary of Commerce promulgated a regulation proposed by the North Pacific Fisheries Management Council (the "Council") that would implement a limited access management plan, covering fixed gear fisheries for Pacific halibut and sablefish, off the coast of Alaska. 58 Fed. Reg. 59,375 (preamble to final rule). The rule created "individual

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[2/] Congress examined IFQ programs during its reauthorization of the Magnuson Act. Amendments to the Act (now known as the Magnuson-Stevens Act) passed by Congress and signed into law by President Clinton preclude approval of any new IFQ programs until October 1, 2000 and require the National Academy of Sciences to develop and submit to Congress a comprehensive report on IFQ programs, to include recommendations to implement a national policy with respect to IFQs. 16 U.S.C. § 1853 (d)(1)(A) and (f)(1).

fishing quota" (IFQ), defined as annual catch limits that could be harvested by a person who has been lawfully allocated "quota share" (QS), defined as a harvest privilege for a specific portion of the "total allowable catch" (TAC) of sablefish or halibut for a specific geographic area. Id. QS were allocated exclusively to persons who owned or leased a vessel that had made legal landing of halibut or sablefish in 1988, 1989 or 1990, the qualifying years. 58 Fed. Reg. at 59,406 (50 C.F.R. § 676.20(a)(1)). Thus, all fishermen were excluded from receiving any QS whatsoever, unless they coincidentally owned or leased a vessel during the qualifying period. Id.

2. Conflicts of Interest on the Council

Of the seven Council members who voted in favor of the IFQ, six had a direct, palpable interest in the outcome: one member was the executive director of the Fishing Vessel's Owner's Association, whose members received a substantial portion of IFQ shares; one member owned freezer vessels and received IFQs; another member owned several vessels and received IFQs; one member, upon leaving the Council, immediately became a lobbyist for the American Factory Trawlers Association; another member,

upon leaving the Council, formed the largest brokerage devoted to the transfer and sale of IFQs; and the family of one member received large IFQ shares.

Despite the obvious conflict of interest on the Council, both the District Court and the Ninth Circuit gave such deference to the Secretary's promulgation of the regulation proposed by the Council that Petitioners were effectively denied judicial review at all.

B. Proceedings Below

The Magnuson Fishery Conservation and Management Act (the "Magnuson Act"), 16 U.S.C. § 1855(b)(1), provides for judicial review of regulations promulgated by the Secretary of Commerce. On November 9, 1993, the Secretary promulgated the above-noted regulation, which Petitioners timely challenged by filing a complaint in the U.S. District Court for the District of Alaska. On December 29, 1994, after oral argument on December 19, the District Court issued an order disposing of all claims and dismissing Petitioner's complaint. The District Court found that the Secretary's action in promulgating the regulation was not arbitrary or capricious.

The Alliance timely appealed that decision to the U.S. Court of Appeals for the Ninth Circuit, which had jurisdiction of the appeal pursuant to 28 U.S.C. § 1291. The Ninth Circuit's decision reflects that the court was obviously disturbed by the effect that the IFQ program would have on fishermen such as Petitioners. Alliance Against IFQs v. Brown, 84 F.3d 343, 352 (9th Cir. 1996). Indeed, the court concluded that the IFQ program "violates the statutory command of fairness and equity to 'all' the fishermen." Id. at 348; see 16 U.S.C. § 1851(a)(1)(A) and 16 U.S.C. § 773c(c). In spite of this statutory violation, however, the court concluded that it could not overturn the Secretary's decision because of the level of deference due. Id. at 352.

ARGUMENT

A. Petitioners were Not Afforded Procedural Due Process Because No Effective Judicial Review Occurred.

The position which Petitioners are advancing here appears to be a somewhat novel one. Yet it is not entirely without precedent: this Court has previously decided cases and announced rules which, if applied in the present context, lead to the conclusion that

petitioners were not afforded procedural due process.

For example, in the context of administrative adjudication, this Court has observed that "a biased decisionmaker is constitutionally unacceptable." Withrow v. Larkin, 421 U.S. 35, 47, 95 S. Ct. 1456, 1464, 43 L. Ed. 2d 712 (1975). The Court also noted in Withrow v. Larkin that "'our system of law has always endeavored to prevent even the probability of unfairness.'" Id., quoting In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955). This Court has expressly found that the probability of actual bias on the part of the decisionmaker "is too high to be constitutionally tolerable" where "the adjudicator has a pecuniary interest in the outcome." Id. See also McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 484, 111 S. Ct. 888, 892, 112 L. Ed. 2d 1005 (1991) (in action involving the Immigration Reform and Control Act of 1986, Court expressed concern over interpreting statute to deny "meaningful judicial review" of petitioners' statutory and constitutional claims in "the absence of clear congressional language" mandating such result).

Although the present case involves administrative rulemaking rather than

adjudication, many of the decisionmakers had a direct, pecuniary interest in the outcome of their decision. Had the Secretary had such an interest in the outcome, surely she would have been required to recuse herself from the process. In this instance, however, the Council that proposed the IFQ Program and the regulation was composed of members who had a direct pecuniary interest. Because the District Court and the Ninth Circuit gave such deference to the Secretary, however, it effectively shielded this biased decisionmaking from judicial review. In other words, had the courts reviewed the actions of the Council rather than the Secretary, or had the courts applied a less deferential standard of review, the courts may have been rightly offended by the patent conflict of interest present on the Council.

The fundamental question presented in this case, therefore, is whether procedural due process requires the courts below to subject the Secretary's action to a level of judicial scrutiny which gives meaning to the phrase "judicial review," particularly in light of the conflict on the Council. The absence of meaningful judicial review in this case has resulted in insulating the procedural irregularities on the Council from any review at all. Obviously, such

an enormous, and enormously biased, decision should be subjected to judicial scrutiny. Just as obviously, however, the very deferential standard of review applied by both courts assured that this significant decision could not be reviewed.

The obvious conflict of interest of the decisionmaker is only one reason justifying heightened scrutiny in this case. In addition, the Magnuson Act precludes the Secretary of Commerce from designing or modifying any limited access plans submitted by a Council for review.[3/] If the court's review is limited as well, there is, in effect, no review of limited access plans that have such an enormous impact on the lives of thousands of fishermen. Clearly, the Magnuson Act intended -- and expressly provides for -- quite the contrary: judicial review of such plans. See 16 U.S.C. § 1855(b)(1).

[3/] The Act allows the Secretary of Commerce to develop a fishery management plan or to modify a plan developed by a council if it does not limit access to the fishery.

B. **The Promulgated Regulation Also Violates an Express Statutory Mandate.**

Any fishery management plan involving sablefish, as well as any regulation promulgated to implement the plan, must comply with seven national standards:

> (1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.
>
> (2) Conservation and management measures shall be based upon the best scientific information available.
>
> (3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

(5) Conservation and management measures shall, where practicable, promote efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

(6) Conservation and management measures shall take into account and allow for variations

> among, and contingencies in, fisheries, fishery resources, and catches.
>
> (7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

16 U.S.C. § 1851(a). Where the Council and Secretary implement a limited access system, however, one of these standards takes on added significance -- the fourth standard.

A fishery management plan involving halibut[4/] is subject to similar restrictions:

> The Regional Fishery Management Council having authority for the geographic area concerned

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4/ Halibut are the subject of the Convention between the United States and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, signed at Ottawa, Canada, on March 2, 1953, as amended by the Protocol Amending the Convention, signed at Washington, D.C. on March 29, 1979.

may develop regulations governing the United States portion of the Convention waters, including limited access regulations, applicable to nationals or vessels of the United States, or both, which are in addition to, and not in conflict with regulations adopted by the Commission. Such regulations shall only be implemented with the approval of the Secretary, shall not discriminate between residents of different states, and shall be consistent with the limited entry criteria set forth in section 303(b)(6) of the Magnuson Fishery Conservation and Management Act [16 U.S.C. § 1853(b)(6)]. If it becomes necessary to allocate or assign halibut fishing privileges among various United States fishermen, such allocation shall be fair and equitable to all such fishermen, based

> upon the rights and obligations in existing Federal law, reasonably calculated to promote conservation, and carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of the halibut fishing privileges. . . .

16 U.S.C. § 773c(c) (emphasis added). Thus, statutes require both the sablefish and halibut limited access plans to be fair and equitable to all fishermen.

Although all seven national standards apply generally to conservation and management measures adopted by the Council and the Secretary, National Standard 4 is the only standard which specifically applies to limited access or allocation systems such as the IFQ program at issue here. Standard 4 provides that, "[i]f it becomes necessary to allocate or assign fishing privileges among . . . fisherman," then the resulting allocation must be (A) "fair and equitable to all such fisherman, (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an

excessive share of such privileges." 11 U.S.C. § 1851(a)(4) (emphasis added); see also 16 U.S.C. § 773c(c). Thus, it is apparent that, if the conservation and management measure adopted by the Council and Secretary involves an allocation of fishing privileges, Standard 4 must be adhered to in its entirety, or the measure must fail. Conversely, if the measure does not involve an allocation of fishing privileges, then the measure must merely "not discriminate between residents of different states." Id. In this instance, the lower courts failed to give sufficient weight to these specific, mandatory provisions of Standard 4. The allocation of fishing privileges pursuant to the IFQ program violates this statutory standard, as the Ninth Circuit candidly acknowledged. Alliance Against IFQs v. Brown, 84 F.3d at 348.

The IFQ program is not "fair and equitable" to all fishermen, as it must be. 16 U.S.C. § 1851(a)(4)(A); 16 U.S.C. § 773c(c). On the contrary, it is unfair to any fishermen -- crew members, even skippers -- who did not also own or lease a vessel and make a landing during a qualifying year. Thus, the program fails to satisfy the requirements of Standard 4. Indeed, the program plainly discriminates against fishermen, in favor of owners of the fishing vessles.

The fact that it may be more difficult for the Secretary to administer a plan that is "fair to all fishermen," does not alter the fairness requirement imposed by statute. 16 U.S.C. § 1851(a)(4)(A); 16 U.S.C. § 773c(c). Indeed, the Secretary has the discretion to approve a plan that does not allocate fishing privileges at all. (Such a plan, incidentally, need not be fair to all fishermen -- see id.) A plan such as the present one, however, that does allocate such privileges, must be fair, to all fishermen. Id. Administrative convenience simply cannot overcome a direct statutory mandate such as the one imposed here. Id.

C. The Plan also Violates Timing Requirements Imposed by Statute.

In developing a limited access system, the Council must take into account six factors:

(1) present participation in the fishery;

(2) historical fishing practices in, and dependence on, the fishery;

(3) the economics of the fishery;

(4) the capability of fishing vessels used in the fishery to engage in other fisheries;

(5) the cultural and social framework relevant to the fishery; and

(6) other relevant considerations. 16 U.S.C. § 1853(b)(6); see also 16 U.S.C. § 773c(c).

"Present participation" involves consideration of two aspects: recency of participation and actual participation, that is, fishing. In this instance, the rule fails to take into account both recency and actual participation. As to the first, the rule allocates QS only to those Owners whose vessels landed fish during 1988, 1989 or 1990. The final rule and program, however, did not go into effect until 1995, five years after the close of the qualifying period. Thus, recency was ignored.

As to the second, only Owners received QS, even though they may never have baited a hook or caught a fish. Conversely, no fishermen who were not also Owners or Lessees received QS, even though they depend on fishing for their livelihood. Clearly, "participation" was ignored as well.

A District Court decision in Seawatch Int'l v. Mosbacher, 762 F. Supp. 370 (D.D.C. 1991), is instructive. In Seawatch, the court upheld a limited access system[5/] against a challenge that it did not reflect present participation: the rule was promulgated two years after the cut-off date for eligibility. Id. In contrast, here, there is a five-year gap between the eligibility cut-off date and implementation (1995, 1990). Accordingly, the rule plainly fails to take into account present participation in the fishery, in violation of the statutory command that it must. 16 U.S.C. § 1853(b)(6); see 16 U.S.C. § 773c(c).

Although some cut-off date is not unreasonable, in this instance the original qualifying-year scheme -- 1988, 1989 or 1990 -- failed utterly to reflect "present participation," because the rule did not go into effect until 1995. The Secretary's failure to adhere to strict time limits imposed by statute on the review and promulgation of the final rule

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[5/] In contrast to the Alaska IFQ program, the limited access plan reviewed by the court in Seawatch granted access to the fishery to all fishermen who were participating in the fishery when the plan was developed.

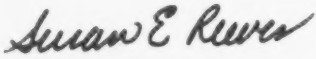
demonstrates the Secretary's total disregard for this present participation requirement. The lengthy delay further supports setting aside the rule, because the Secretary violated these statutory deadlines.

The Magnuson Act requires the Secretary to publish the final rule within 110 days of the receipt date. 16 U.S.C. § 1855(a)(1). In this instance, although the receipt date was October 26, 1992, the Secretary did not publish the final rule until November 9, 1993, more than 379 days later and more than three times the period permitted by statute. Therefore, the Secretary's failure to adhere to the statutory timetable renders the final rule, which implements the IFQ program, legally defective as well.

CONCLUSION

For the reasons stated the petition for a Writ of Certiorari should be granted.

Respectfully submitted this 13th day of November, 1996.



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